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**Issue date: 02Oct2001**

Case No.: **2001-LHC-0208**

OWCP No.: **15-38345**

In the matter of

**DORIS M. SATTERFIELD,**  
Claimant,

v.

**UNITED ENGINEERS & CONTRACTORS, INC.**  
**dba RAYTHEON ENGINEERS & CONTRACTORS,**  
and  
**LIBERTY MUTUAL INSURANCE,**  
Employer/Carrier,

and

**DIRECTOR, OFFICE OF WORKERS'**  
**COMPENSATION PROGRAMS,**  
Party-In-Interest.

**DECISION AND ORDER**

This proceeding arises from a claim filed under the provision of the Longshore and Harbor Workers, Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was scheduled to be held in Colorado Springs, Colorado on May 31, 2001 at which time all parties were to be afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. However, the hearing was canceled as the Claimant and the Employer resolved their issues. A briefing date was set for the issue of Section 8(f) relief.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the

arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

The Employer has submitted 14 exhibits and these are marked as EX 1-14 and are entered into the record. The Director has submitted one exhibit which will be marked as DX 1 and entered into the record.

### **Contentions**<sup>1</sup>

The Employer acknowledges that the Claimant sustained injuries to her left arm, wrist, and knee in 1990 while in the employ of that firm. However, about 1976, the Claimant underwent a cervical discectomy.

The Employer argues that

Claimant\*s pre-existing cervical fusion has contributed to her ulnar neuropathy and left wrist condition to produce greater disability. Her left wrist fracture (in 1990) would not have in and of itself produced permanent total disability; but rather, the existence of the preexisting upper extremity radiculopathy in fact combined with the ulnar neuropathy and a left wrist fracture to produce this permanent total disability. Thus, the Employer has demonstrated through competent medical testimony of both Drs. Karl Gross and Yechiel Kleen that Claimant\*s second injury by itself would not have led to permanent total disability. Thus, the Employer has fulfilled its duty to demonstrate that the left wrist fracture alone was not the cause of Claimant\*s permanent total disability. See, E.P. Paup Co. v. Director, OWCP, 999 F.2d 1341 (9th Cir. 1993); see, also, Sproull v. Director, OWCP, 86 F.3d 895 (9th Cir. 1996).

Arguably, even if the cervical fusion surgery which produced upper extremity impairment which, of course, is directly related to both ulnar neuropathy

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<sup>1</sup> The following abbreviations will be used as citations to the record:

DX	-	Director's exhibits;	and
EX	-	Employer's exhibits.	

and the left wrist impairment resulting from her fracture, were not directly related from a medical standpoint, since this is a case of permanent total disability, the existence of this cervical fusion in and of itself is sufficient to establish both the pre-existing requirement and the manifest requirement inherent in Section 8(f) of the Act.

The Director argues that

Satterfield's second work-related injury (wrist) occurred on Johnson Atoll in 1990. Her cervical discectomy occurred sometime around 1976. The problem here is that employer/carrier did not learn of the surgery or the degeneration until 1999-2000-nearly ten years after the second injury in this case. There was no diagnostic testing or documentation regarding Satterfield's cervical spine degeneration prior to March 3, 2000, and the records of the cervical discectomy (which was not inherently disabling) have been destroyed for an unspecified period of time. Therefore, there is no dispute that, prior to the wrist injury in 1990, Satterfield's cervical spine problem was not "manifest" to employer/carrier who simply had no idea about these problems. In fact, the cervical spine problems were not manifest until approximately 10 years after Satterfield's second injury. As a result, employer had no reason to fire Satterfield because of a previous permanent partial disability; thus the "manifest" test is not satisfied by employer/carrier's case and an award of section 8(f) relief does not further the underlying policy of the statute.

Employer/carrier may argue that it had constructive knowledge of Satterfield's cervical spine discectomy. The Director concedes that Court's have granted section 8(f) relief based upon an employer's constructive knowledge of an employee's pre-existing disability.

The Director argues that

The Employer/carrier could not have discriminated against Doris Satterfield because it

did not know of her cervical spine conditions prior to the 1990 wrist injury. Accordingly, the District Director's denial of section 8(f) relief should be affirmed.

### **Evaluation of the Evidence**

The Employer and the Claimant stipulated to the following:

1. The Claimant is permanent and totally disabled.
2. The date of maximum medical improvement is November 3, 1999.

The Director was not a party to these stipulations.

Records from Dr. Stuebner reflect treatment beginning about 1985. In April of that year, the Claimant complained of chest pain, and a stress test was negative. In September 1987, X-rays of the lumbar spine and sacrum were considered to be normal. Contrast material from a previous myelogram was noted. [EX 9].

When deposed in February 1995, the Claimant testified that she began working for Stearns Roger (United Engineers) in 1973 and stayed with that firm until 1991. She fell in 1990 and injured her wrist in attempting to lessen her fall. Thereafter, she was unable to type and she was awarded social security disability benefits in 1993. [DX 1].

In a deposition in 2001, there was a discussion between the Claimant and the Employer's counsel.

Q All right. Now, one of the things we have learned since 1995 is that you have had a problem in your neck, and, in fact, had neck surgery way back, 20 or 30 years ago?

A Right.

Q Do you recall what year it was that you had the neck surgery?

A No, I don't '78. Late seventies, maybe the early eighties.

Q Do you recall why it was that you needed to have this neck surgery?

A I have the what?

Q Why it was that you had to have the neck surgery? Do you recall that?

A I was having a lot of pain.

Q Okay. Do you recall where were having the pain?

A On the left side, down into my shoulder. From the neck down to my shoulder.

Q Was the pain at all radiating down into your left arm? Do you recall that? Where you might have had any numbness or tingling in your arm or fingers, or anything like that?

A No.

Q Do you recall the name of the doctor who performed the surgery?

A Steven Samuelson.

Q Okay. Following the surgery, I take it, it was successful, and it pretty much resolved the problems that you had?

A Yes.

Q You were able to continue to work as a secretary and as a clerk?

A Yes. [EX 5].

A report from Aurora Orthopedic Surgery Associates indicates that the Claimant was referred in early 1991 by Dr. Steubner. Clinical data indicated that she fell and that a subsequent X-ray suggested an undisplaced linear fracture of

the medical aspect of the left distal radius. The X-ray in 1991 was considered to be normal.

Records in 1993 suggested that Ganglion surgery was performed on the left wrist on two occasions in 1983. In 1994, Dr. Conyers reported that two procedures were performed on the wrist in late 1993.

On examination by Dr. Bralliar in 1997 clinical data indicated that

Left wrist surgery was done in 1993, after which the entire arm was in a cast for perhaps six months. The left elbow became "very painful" during that time so surgery was done on the elbow in 1994, after which the arm was in a cast for about three months. The immobilizations caused strain on the left shoulder and a "frozen shoulder." Therapy, which included stretching, was begun for fingers and wrist; following elbow surgery stretching exercises for the frozen shoulder were begun as well, but did not help. Over time the subject's son did "deep massage" on her shoulder and the pain eased some.

Post-operatively the elbow improved. The wrist is still painful, although not as much as before surgery. Ms. Satterfield was released from Dr. Conyer's care in March of 1997.

Following evaluation Dr. Bralliar reported that

Ms. Satterfield fell onto her outstretched left arm while on assignment on Johnston Atoll. Initial x-rays of the painful wrist were read as negative. When the subject returned to the United States a month or so later and sought further medical care, a second set of x-rays revealed a questionable old fracture. Conservative measures did not improve the pain so a wrist fusion was done, followed months later by removal of arthritic-type changes on the left elbow joint. After both surgeries, the left upper extremity was immobilized in a long-arm cast, which unfortunately led to further disabilities and impairments including stiffness and pain in the left shoulder.

The patient's condition has stabilized and is not expected to change significantly in the future. Her history of injury is consistent with findings on medical examination. Using the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Ms. Satterfield has a 48% left upper extremity impairment, which converts to 29% whole person impairment.

Data recorded by Dr. McLaughlin in early 1998 indicated that the Claimant

underwent a reported three-level cervical fusion in the 1970s. She has done well with that without reported further neck or radicular problems. She had a left wrist ganglion excised in 1981. She notes no further or ongoing left wrist problems until her fall of 11/30/90.

Following examination assessments included

4. Status post remote multilevel cervical fusion with mild residual cervical range of motion loss without ongoing radiculopathy or myelopathy. [EX 4].

When deposed in early 2001, Dr. Gross testified that he examined the Claimant in 1999. While Dr. Kleen had diagnosed reflex sympathetic dystrophy (RSD), Dr. Ring had not agreed with that assessment. Dr. Gross was concerned about the neck fusion in the 1970s and he ruled out RSD.

That examination had revealed a barely visible scar on the neck. [See EX 2]. Dr. Gross felt that many of the current symptoms were related to the cervical spine surgery. [EX 6].

Subsequent to the deposition, Dr. Gross stated that

In followup to the issues raised at and discussed with my deposition today, the following impairment rating numbers are the correct ones utilizing the 4th Edition of the "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association.

Table 75, page 113, specifies in the category II D (surgically treated disc lesion without residual signs or symptoms) a 7% impairment of the whole person. Now that I am reviewing this matter in more detail, and re-read my August 23, 2000 note, I understand that I added a 1% impairment of the whole person for the C5-6 level abnormality as described in IIF, thus arriving again at an 8% impairment of the whole person which is thus unchanged from the August 23, 2000 letter. (During the deposition I had assumed that I had misread the number to be 8 from the lumbar spine column).

Utilizing table 15 on page 54, I would again assess 10% upper extremity impairment for the ulnar neuropathy. [EX 2].

Dr. Kleen was deposed in April 2001 and testified that he began treating the Claimant in early 1998. The physician was asked

would a cervical spinal fusion have any impact whatsoever upon left upper extremity impairment, generally speaking?

A. Whether a cervical fusion will have impact on impairment of an upper extremity?

Q. Yes.

A. It may.

Q. Okay. In this particular case were you able to make any determination that that was in fact the case? I'm asking you--I know were at the beginning of the deposition and we just reviewed your initial reports, but you had the advantage of having treated this woman for many years and, obviously, you have quite a chart there. So while we're on the subject of history, I thought we would address this issue.

R. I did not feel that the cervical fusion has any impact on the presentation of the left upper extremity complaints and symptoms and findings that I found impairment-wise. In other words, I did not feel that the cervical condition had anything to do

with the way she presented. And I can detail if you want me to.

Q. That having been said, can you rule it out?

A. Yeah, and I can tell you how I ruled it out.

Q. Go ahead.

A. Okay. The area of fusion was the C6-C7.

Q. Okay.

A. The area of presentation of symptoms were C8-T1.

Q. Okay.

A. And therefore, it was not in a distribution nerve-wise of the cervical fusion surgery.

Q. Okay.

A. And that's how I came to the conclusion that her symptoms are not related to the preexisting cervical fusion. [EX 7, see EX10].

### **Section 8(f)**

An employer may invoke Section 8(f) of the Act to limit its liability for compensation payments for permanent disability to 104 weeks of compensation. To recover payments for permanent disability under this provision, Employer must establish the following elements: (1) the employee had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer prior to the work-related injury; (3) the subsequent work-related injury alone would not have caused the employee's ultimate permanent disability; and (4) the ultimate permanent disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. MeDuffie v. Eller & Co., 10 BRBS 685, 695 (1979); Sacchetti v. General Dynamics Corp., 14 BRBS 29, 34 (1981); Lockheed Shipbuilding v. Director, OWCP, 25 BRBS 85, 87 (CRT) (9th Cir. 1991). Employer retains the burden of proving each of the elements necessary for relief under Section 8(f). Director, OWCP v.

Newport News Shipbuilding & Dry Dock Co. (Langley), 676 F.2d 110 (4<sup>th</sup> Cir. 1982).

### **Discussion**

The deposition in 1995 indicates that the Claimant began working for the Employer in 1973. In the latest deposition, the Claimant indicated that the cervical spine surgery occurred in 1978 or subsequently.

The medical documentation in this case is extremely sparse. The Employer has not provided a medical report from Dr. Samuelson who apparently conducted the surgery on the neck. In addition, the record does not contain reports from Dr. Steubner at the time of initial treatment for the wrist injury.

It is curious that the Employer disclaims knowledge before the 1990s of the cervical spine surgery in 1970s although Satterfield was apparently an employee during the 1970s.

Based on the neck scar and other evidence, it is clear that cervical spine surgery was conducted prior to 1990.

The Director has indicated that this case falls under the jurisdiction of the U.S. Circuit Court of Appeals for the Ninth Circuit as the Claimant was injured on Johnson Atoll in 1990, and the undersigned will concur. (It is noted that the Claimant currently lives in Colorado).

### **Pre-Existing Permanent Partial Disability**

In order for the employer to obtain relief pursuant to Section 8(f), Claimant must have a permanent partial disability that predates her work-related injury. The term "disability" under Section 8(f) is not limited to an economic disability under Section 8(c)(21) or one of the scheduled losses specified in Section 8(c)(1)-(20). Disability for purposes of Section 8(f) also encompasses those cases in which an employee has a serious physical disability which would motivate a cautious employer to dismiss the employee because of a greatly increased risk of employment-related accident and compensation liability. C & P Telephone Co. v. Director, OWCP, 564 F.2d 503, 512-513 (D.C. Cir. 1977); Cononetz v.

Pacific Fisherman, Inc., 11 BRBS 175, 177 (1979); and Johnson v. Brady-Hamilton Stevedore Co., 11 BRBS 427,434 (1979). The mere fact of a past injury does not establish disability. The injury must result in some serious and lasting physical problem. Director v. Belcher Erectors, 17 BRBS 146, 149 (CRT) (D.C. 1985); Smith v. Gulf Stevedoring Co., 22 BRBS 1, 3 (1988).

In this case, the Claimant underwent spinal surgery prior to the injury in 1990. While she was relatively asymptomatic from the surgery, this procedure is a major insult to the body.

### **Manifestation**

Records of the treatment were available even though the Employer expresses ignorance of major surgery to its own employee. This case meets the requirements of Director, OWCP v. Cargill, Inc., 16 BRBS 137 (CRT)(9th Cir. 1983), as to pre-existence and as to manifestation. See Director, OWCP v. Coos Head Lumber, 33 BRBS 131(CRT)(9th Cir. 1998).

### **Contribution**

Section 8(f) relief is available if employer establishes that claimant had a manifest pre-existing permanent partial disability that combined with the work injury to result in a greater degree of permanent disability. See Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983).

The Employer relies on the opinions of Drs. Gross and Kleen on the question of contribution of the pre-existing residuals of cervical spine surgery to the level of overall impairment.

Dr. Gross has assigned a 8% rating for residuals of cervical spine surgery. He has noted degenerative arthritis and stated that there is some stiffness. The physician stated that the elbow problems began about 1994 and are unrelated to the neck.

Dr. Kleen stated that the Claimant's current findings were unrelated to the cervical spine fusion. The physician felt that the ulnar nerve problem at the elbow and the

"frozen" shoulder were related to treatment for the wrist fracture. However, Dr. Kleen did answer yes to a question of whether or not the cervical spine fusion made her symptoms worse.

The undersigned does not find it clear that these two physicians, or any of the others, have clearly spelled out that the pre-existing disability significantly added to the overall impairment.

Thus, the contribution element has not been met for a grant of Section 8(f) relief.

## **ORDER**

The application for Section 8(f) relief is **DENIED.**

A  
RICHARD K. MALAMPHY  
Administrative Law Judge

RKM/ccb  
Newport News, Virginia